



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO 616 OF 2005

IN THE MATTER OF THE ESTATE OF MUSYOKA KANGULE MUMO (DECEASED)

MUIA MUSYOKA.....APPLICANT

VERSUS

BENEDICT MWANZIA MUTINDA.....RESPONDENT

RULING

1. By Summons dated 31st July, 2017, the Applicant herein seeks the following orders:

1. **THAT** the caution entered against the Applicant's Title Mavoko Town Block 3/2200 on the 31st October, 2016 be removed forthwith.

5. **THAT** the costs of this application be paid for by the respondent.

2. According to the Applicant, he is one of the legal representatives of the estate of **Musyoka Kangule Mumo**, the deceased, who was the registered proprietor of the Land Parcel Number Mavoko Town Block 3/2200.

3. According to the applicant, the Cautioner herein is not a son to the deceased and the allegation that he is a beneficiary to the estate of the deceased has no basis.

4. The applicant therefore urged this court to order the removal of the Caution he lodged on 31st October, 2016 in order to enable them transfer the estate to its rightful beneficiaries mentioned the Grant of Letters of Administration.

5. In response to the application, the respondent contended that the said property belonged to their late grandfather, **Kangule Mumo**, also deceased. The said **Kangule Mumo** had two wives namely, **Mundia Kangule** and **Ndila Kangule**. According to the Respondent, his father, **Mutisya Kangule**, is from the 2nd wife of the said **Kangule Mumo**.

6. It was therefore the Respondent's contention that **Musyoka Kangule**, the deceased herein who died on 26th December, 1988, was holding the suit property in trust for all the beneficiaries of the said **Kangule Mumo** who in turn was holding the same in trust for all the beneficiaries.

7. It was averred that the grant of representation to the Estate of **Musyoka Kangule** was issued to **Muia Musyoka** the grandchild of the 1st wife of **Kangule Mumo**, and the grant was confirmed on 20th March, 2017 and the Estate distributed. According to the Respondent, the said **Musyoka Kangule**, before his death had fraudulently acquired the property herein to himself knowingly clearly that a portion of the suit property had been subdivided in 1994 giving them their entitlement as dependants of **Ngila Kangule**.

8. Accordingly, the Respondent's claim from the estate is a portion of 2 and ½ acres of the property in question. To him, the applicant knows that the Respondent and the other beneficiaries are entitled to a share of the suit property but failed to include the Respondent as a beneficiary and has fully and solely ben using the same and denying them part of their share. Further the Applicant failed to inform the Respondent for purposes of indicating his interest when the Estate was coming for distribution. Despite the Respondent's several requests for a meeting for the purposes of distribution, subdivision and transfer of the said 2 and ½ acres to no fruition hence the reason for placing a caution on the title to protect their interests.

9. The Respondent contended that the applicant intends to defraud the Respondent of his beneficial interest to own the suit property hence the application is unmerited as the applicant lacks clean hands to be aided by the court. The Respondent further accused the Applicant of having concealed material facts when obtaining the grant through deliberate and untrue allegations and by failing to include the Respondent, a dependant of the estate.

10. In support of his contention the Respondent exhibited a copy of an agreement made between **Joel Musyoka, John Makenzie Mailu, David Mailu, Sammy Kingoo Muli and Mutiso Wambua Mailu** in which it is stated that **Mundia Kangunde** was to get 5 acres from plot No. 322 while **Ndila Kangunde** was to get 5 acres therefrom. From the applicant's submissions plot no. 322 is the same as **Mavoko Town Block 3/2200**. However, it is contended that the suit land belongs to the deceased herein who purchased it from Lukenya Ranching & Farming Co-operative Society Limited in which he was a member. It was therefore submitted that the said property belongs to the deceased herein who is the absolute proprietor thereof by virtue of section 24 of the **Land Registration Act** as read with sections 25 and 26 thereof. According to the applicant the said land was never an ancestral land and was hence never owned by **Kangule Muli**. In support of his case the applicant relied on a ruling delivered in this case on 27th November, 2014.

Determination

11. I have considered the issues raised herein. In the ruling delivered on 27th November, 2014, the Court found that there was no evidence that the suit parcel of land belonged to **Kangule Mumo** since the agreement relied upon by the Objector was made after the death of the said person and was therefore inadmissible. It is the same agreement that is the basis of the caution.

12. Without delving into the issue whether there was a trust in favour of the beneficiaries of the estate of **Kangule Mumo**, it is clear that the suit parcel whether rightly or wrongly is registered in the name of the deceased herein. There is therefore no basis for the Respondent herein to maintain the said caution thereon when he has not initiated any legal steps to establish his rights and interest therein.

13. In **Matoya vs. Standard Chartered Bank (K) Ltd & Others [2003] 1 EA 140**, it was held that:

“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented.”

14. In my view for the Respondent herein to establish his interest in the suit property, it is upon him to institute appropriate legal proceedings before the Environment and Land Court in which he can seek a restriction on dealings in the said land pending determination of his interests therein. He however has no basis registering a caution thereon without proceeding further to have his interests therein established.

15. In the premises I find merit in the application dated 31st July, 2017. Consequently, I hereby order that the caution entered against Land Title Mavoko Town Block 3/2200 on the 31st October, 2016 be removed forthwith.

16. As regards the costs, this court direct parties to furnish it with soft copies of their pleadings and submissions in word format. However, only the Respondent partly complied by furnishing the submissions only while the Applicant sent scanned copies contrary to the order of the court. Section 1A(3) of the **Civil Procedure Act** provides as hereunder:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

17. One of the overriding objectives of the **Civil Procedure Act** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, there will be no order as to the costs of this application.

18. It is so ordered.

Read, signed and delivered in open Court at Machakos this 3rd day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muthama for Mr F N Kimani for the applicant

N/A for the Respondent

